

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision made by the Ministry of Social Development and Social Innovation (“the ministry”) dated December 2, 2014 which held that the appellant does not qualify as a person with persistent multiple barriers (PPMB) to employment because she did not meet all the criteria under Section 2(3) of the Employment and Assistance Regulation (EAR). In the opinion of the minister, based on the information provided by the appellant’s physician, the appellant’s reported restrictions do not preclude her from searching for, accepting, or continuing in all types of employment including sedentary or part-time.

The ministry determined that the appellant met Section 2(2) as she has been a recipient of income assistance for at least 12 months of the preceding 15 calendar months. Also, the ministry determined that the appellant scored 15 on the employability screen as set out in Schedule E, meeting the required 15 under Section 2(3) and should be subsequently assessed under Section 2(3) of the EAR.

The appellant has met Section 2(3)(a) as it has been established that in the opinion of a medical practitioner, she has a medical condition that has lasted for 4+ years and is expected to continue for at least 2 more years.

PART D – Relevant Legislation

Employment and Assistance Regulation (EAR), Section 2.

PART E – Summary of Facts

The evidence before the ministry at the time of reconsideration included:

- a Medical Report - Persons With Persistent Multiple Barriers (PPMB) dated July 15, 2014 and completed by the appellant's physician;
- an Employability Profile dated September 30, 2014;
- an Employability Screen with a Total Score of 15;
- the appellant's Request For Reconsideration dated November 3, 2014 which included;
 1. a letter from the appellant's advocate with prepared questions and responses written by the appellant's physician and dated November 10, 2014, and
 2. a submission from the appellant's advocate.

In the Medical Report, the physician who has known the appellant for over 6 months reported that the appellant's primary medical condition is Right L5-S1 Herniation, onset February 2011 and the secondary medical condition is Chronic Obesity. Under treatment it is noted physio in the past and activity modification with both outcomes noted as unchanged but stable. The stated condition has existed for 4+ years with the prognosis stated as has "improved on t/o MRI but clinically continues to have neuralgia, controlled with meds, needs to lose weight." Noted is that the medical conditions are not episodic in nature and under restrictions specific to the reported medical conditions, the physician wrote cannot bend, twist, rotate as it causes worsening of herniation and must be careful with ADL's.

A copy of the Employability Screen indicated a total score of 15 with results that correspond with Expected to Work (score 15+) and suggests Employability with Longer – Term Interventions.

A copy of the Employability Profile indicated that the appellant:

- o has been unemployed for over 3 years,
- o has a good employment search strategy and definite plan of action,
- o has grade 0-9 education,
- o is fluent in written/spoken English,
- o has vehicle/public transportation available and accessible,
- o has reliable childcare, and
- o has adequate shelter.

In the letter from the appellant's advocate completed by the appellant's physician dated November 10, 2014, the following questions (Q) and responses (R) were written:

Q.1 Please describe your patient's medical conditions:

R.1 Degenerative LBP and known disc herniation.

Q.2 After consulting with your patient, have her medical conditions lasted for at least 1 year, and are they likely to continue for at least 2 more years?

R.2 Chronic and ongoing, yes to question, will likely continue more than 2 years.

Q.3 Are your patient's health related restrictions severe enough to preclude her from searching for or accepting any employment in the foreseeable future? If so, please describe her current restrictions:

R.3 Yes. Difficulty standing, bending, twisting, carrying any significant loads/weights. Cannot walk for protracted periods of time.

The submission from the appellant's advocate has gone to argument.

In her Notice of Appeal (NOA) dated December 8, 2014, the appellant wrote that she has constant pain and numbness, from her lower back to her toes which has been going on for more than 4 years and that as her physician has indicated can go on longer. She indicated that she will have a CT scan on December 28 and has been consulting with a neurosurgeon about surgery. Because of the pain and numbness which is unbearable

at times, the appellant stated that she can't help her son with soccer (kicking the ball or running) and would like to do things with him. The appellant further indicated that shopping, bathing, everyday life is hard and walking, standing, sitting, for long or short periods of time hurts.

With the appellant's NOA, 2 notes from her physician were included as follows:

1. Dated November 14, 2014, the physician reported that the appellant has bilateral feet pain, right knee/right ankle pain and feeling of instability, feels numb/cold and about to snap, getting similar problems, 1&1/2, left foot, feels like something heavy dropped onto left foot, both ankles feel stiff but right foot feels weak, no GI/GU compromise/loss control, on Gabapentin 600mg, qid and Tylenol 3, known chronic lumbar herniation but no imaging since 2012, cannot lift, bend, stand for any period of time. Cannot work due to this. On clinical exam hard to examine due to BMI, pain standing on bilateral feet, +root signs bilateral. Reflexes hard to elicit due to body habitus. A&P- get EMG bilateral leg; get foot/ankle x-rays to rule out joint/bone problem, repeat CT lumbar spine.
2. Dated December 8, 2014, the physician reported that EMG report pending, continues to have neuropathy signs, worse on right leg, difficulty with chronic pain and weight bearing, awaits CT on December 28, 2014, discussed x-ray findings, left heel spur and 1st toe OA, hurts over right foot+++ but likely related to problems with biomechanics and lower back issues, difficult to solve, needs excellent support shoe wear, therapy to condition leg/ feet can help. Await CT +/- neurological evaluation.

Also with the appellant's NOA, a Medical Imaging Report dated November 17, 2014 with the following summary;

- Left calcaneal plantar moderate sized spur,
- Early left 1st metatarsophalangeal osteoarthritis, and
- No other significant abnormality seen.

At the hearing, the appellant testified that her condition is continually getting worse, the arthritis in her big toe aggravates her DLA, she can't sit for long periods as her tail bone hurts, she feels like her circulation stops so she must stand and has to be careful not to twist when getting up. She reported that she receives assistance with DLA from her parents and son. The appellant stated that her pain is always there, 24/7, her son's school is a 10 minute walk and when she returns from the school, she needs to sit. The appellant confirmed that she does not use a cane or any other assistive device and would like to play soccer and do other things with her son but is restricted by the pain. The appellant indicated that she is currently awaiting results of her CT scan and nerve testing and that her physician has discussed the possibility of surgery with her; however, she is very concerned about surgical complications and becoming paralyzed. She concluded that she did not think that her restrictions and need for sick time would be fair to a potential employer.

The ministry stated no objection to the admissibility of the new information included in the NOA and relied on its reconsideration decision.

Admissibility of New Information

The new information the appellant provided prior to the hearing regarding her medical conditions and employability, along with her testimony provided additional detail with respect to issues addressed in the original PPMB application forms. Accordingly, the panel has admitted this new information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with Section 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

The issue under appeal is the reasonableness of the ministry's reconsideration decision which held that the appellant does not qualify as a person with persistent multiple barriers to employment because she did not meet all the criteria under Section 2(3) of the Employment and Assistance Regulation. In the opinion of the minister, based on the information provided by the appellant's physician, the appellant's reported restrictions do not preclude her from searching for, accepting, or continuing in all types of employment including sedentary or part-time.

The ministry determined that the appellant met Section 2(2) as she has been a recipient of income assistance for at least 12 months of the preceding 15 calendar months. Also, the ministry determined that the appellant scored 15 on the employability screen as set out in Schedule E, meeting the required 15 under Section 2(3) and should be subsequently assessed under Section 2(3) of the EAR.

The appellant has met Section 2(3)(a) as it has been established that in the opinion of a medical practitioner, she has a medical condition that has lasted for 4+ years and it is expected to continue for at least 2 more years.

Relevant Legislation, EAR

Persons who have Persistent Multiple Barriers to employment

2 (1) To qualify as a person who has persistent multiple barriers to employment, a person must meet the requirements set out in(a) subsection (2), and (b) subsection (3) or (4).

(2) The person has been a recipient for at least 12 of the immediately preceding 15 calendar months of one or more of the following:(a) income assistance or hardship assistance under the Act, (b) income assistance, hardship assistance or a youth allowance under a former Act, (c) a disability allowance under the Disability Benefits Program Act, or (d) disability assistance or hardship assistance under the Employment and Assistance for Persons with Disabilities Act.

(3) The following requirements apply (a) the minister (i) has determined that the person scores at least 15 on the employability screen set out in Schedule E, and (ii) based on the result of that employability screen, considers that the person has barriers that seriously impede the person's ability to search for, accept or continue in employment,(b) the person has a medical condition, other than an addiction, that is confirmed by a medical practitioner and that,(i) in the opinion of the medical practitioner (A) has continued for at least one year and is likely to continue for at least 2 more years, or (B) has occurred frequently in the past year and is likely to continue for at least 2 more years, and(ii) in the opinion of the minister, is a barrier that seriously impedes the person's ability to search for, accept or continue in employment, and(c) the person has taken all steps that the minister considers reasonable for the person to overcome the barriers referred to in paragraph (a).

(4) The person has a medical condition, other than an addiction, that is confirmed by a medical practitioner and that, (a) in the opinion of the medical practitioner,(i) has continued for at least 1 year and is likely to continue for at least 2 more years, or (ii) has occurred frequently in the past year and is likely to continue for at least 2 more years, and (b) in the opinion of the minister, is a barrier that precludes the person from searching for, accepting or continuing in employment. (B.C. Reg. 263/2002)

In accordance with the legislation to qualify as a PPMB the appellant must meet the all the criteria set out in Section 2, subsection (2) and subsection (3) or (4). The criteria in Section 2, subsection 2, and subsection (3)(a), have been met.

Ministry's Position

The ministry's position is that a medical condition is considered to preclude the appellant from searching for, accepting or continuing in employment when as a result of the medical condition, the appellant is unable to participate in any type of employment for any length of time except in a supported or sheltered-type work

environment. The ministry argues that based on the information provided by the appellant's physician, the

appellant's medical condition as reported does not preclude her from searching for, accepting or continuing in all types of employment including sedentary or part-time. For these reasons, in the minister's opinion, the appellant's medical condition and resultant restrictions do not preclude her from searching for, accepting or continuing in all types of employment; therefore she does not meet all the eligibility criteria of subsection 2(3) of the EAR.

Appellant's Position

The appellant's advocate argues that the EAR states that the applicant for PPMB must meet the requirements set out in subsection (3) or (4) and that the appellant's doctor has confirmed that she meets the requirements of subsection (4). The advocate states that the appellant's doctor reported that her medical condition, Degenerative LBP and known disc herniation is chronic and ongoing. Regarding subsection 4(b), the physician has clarified when asked: "Are your patient's health-related restrictions severe enough to preclude her from searching for or accepting any employment in the foreseeable future?" the physician responded "Yes. Difficulty standing, bending, twisting, carrying any significant loads/weights. Cannot walk for protracted periods of time." The appellant testified that she is limited in her mobility due to ongoing pain, 24/7, and that her condition is continually getting worse.

Panel's Findings

The panel finds that the reconsideration decision has reasonably applied the legislation, namely section 2 of the EAR, when determining that the appellant's application for PPMB should be assessed under subsection (3). However, the panel finds that it was not a reasonable application of the legislation to subsequently consider whether the appellant's medical conditions "preclude" her from searching for, accepting or continuing in employment which is the legislated criteria of subsection (4). Consequently, the panel rescinds the reconsideration decision and refers the matter back to the ministry to make a determination as to whether the appellant meets the criteria of subsection 2(3) of the EAR.